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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

October Term, 1955

No. 193

EARL WEST, et al, *Petitioners*

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIOARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SIMS PRINTING CO.

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No.

EARL WEST, et al, *Petitioners*

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIOARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Your Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on April 19, 1956.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, in the above entitled cause numbered 14,854, was entered on the 19th day of April, 1956, and to date has not been published in the Reports.

JURISDICTION

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit was entered on the 19th day of April, 1956. A timely motion for rehearing was

filed on May 17, 1956, and on May 25, 1956, an order was entered by the Circuit Court of Appeals denying the Petition for Rehearing (App. A14).

The jurisdiction of the District Court was invoked under 28 U.S.C., Sec. 1345. The jurisdiction of the Circuit Court rests on 2 8U.S.C., Sec. 1291. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED

1) The interpretation and application of Article VIII of the Constitution of the White Mountain Apache Tribe, Fort Apache Indian Reservation.

2) Did the Petitioners have vested rights or rights of occupancy of long established allocation and do those rights include grazing privileges as well as dwelling places and improvements within the meaning of Article VIII of the Constitution?

3) Is Article III of Ordinance 22, of the White Mountain Apache Tribe, Fort Apache Indian Reservation, which attempts to interpret and to limit the application of Article VIII, unconstitutional and in violation of Article VIII of the Tribal Constitution?

STATUTES INVOLVED

The determination of the merits of this case involve Article VIII of the Tribal Constitution and Article III of Ordinance 22 of the White Mountain Apache Tribe, Fort Apache Indian Reservation, which are set out in full in the appendix and quotations from which will be found in the statement (App. A11, A12).

STATEMENT

The Petitioner, EARL WEST, is a white man and the husband of Petitioner ELSIE WEST, who is a member of the White Mountain Apache Tribe, Fort Apache Indian Reservation, and other Petitioners are children of ELSIE WEST and EARL WEST and all are either enrolled members of the White Mountain Apache Tribe or are eligibile to be so enrolled. (R 30)

ELSIE WEST is a granddaughter of Corydon Cooley, (R. 31, Pars. 6 & 7), a white man, who in 1872 married an Apache Indian and began raising cattle on what is now part of the Indian reservation (R. 30, Par. 5).

EARL WEST and ELSIE WEST have grazed cattle on the Fort Apache Indian Reservation since 1923 and the other Petitioners, their children, have owned and grazed cattle on the reservation for several years prior to 1953. (R. 31, Par. 8).

In 1926, the then Superintendent of the Reservation recognized the right of the West family to graze cattle on the reservation and particularly on that portion of the reservation where they were grazing cattle in April of 1953. (R. 31-32, Par. 9).

In 1936, the then Superintendent of the Reservation again recognized the rights of the Petitioners on the reservation. (R. 32, Par. 10).

That since 1924, the Petitioners have made valuable improvements on that portion of the reservation where they were grazing cattle, consisting of houses, fences, wells and so forth. (R. 32, Par. 11).

On August 15, 1938, the Tribe adopted a constitution and by-laws in accordance with Section 16 of the Indian Reorganization Act of July 18, 1934, (48 Stat. 984) and as amended by the Act of July 15, 1935, (49 Stat. 378) and said Constitution and By-laws were approved by the Secretary of the Interior on August 26, 1938. (R. 20, Par. 2).

On August 3, 1953, the Council of the Indian Tribe enacted an ordinance known as Ordinance No. 22 which was approved by the Superintendent of the Agency and was approved by the Assistant Secretary of the Interior on November 3, 1953. Said Ordinance became effective August 7, 1953. (R. 29, Par. 3).

That in April of 1954, the Superintendent of the Reservation, together with members of the Tribe, seized Petitioner's cattle and removed them from that part of the reservation where they were grazing. This seizure was made without any process or order from any court. (R. 33, Pars. 14-15).

That in May of 1954, this action was commenced in the District Court, for the District of Arizona, by the United States of America, in which action the plaintiff demanded possession of all lands on the reservation where Petitioners had been grazing cattle and for an order permanently enjoining and restraining Petitioners from causing or permitting their cattle from entering upon or grazing upon the reservation. (R. 4-20).

The trial court found for the Petitioners and against the Government (R.35), and as a matter of law found that the Petitioners had acquired rights of occupancy within the meaning and protection of Article VIII of

the Constitution and that Ordinance 22 was ineffectual to change or abrogate the rights of Petitioners (R. 34). The Circuit Court reversed the judgment of the trial Court (App. A13).

REASONS FOR GRANTING WRIT

The question presented by this petition, and which was raised in the Circuit Court by the Statement of Points to be relied on upon appeal (R. 158) is an important and novel legal question in that it involves the interpretation of the Constitution adopted by the Tribe and also involves the constitutionality of an ordinance adopted by the Tribal Council.

The determination of this question could affect every Indian Tribe which has been granted self-government.

The pertinent part of Article VII of the Tribal Constitution reads as follows:

> "Right of occupancy of long established allocations or dwelling places and improvements made by individuals or families on tribal lands shall be confirmed by the Council through appropriate ordinances."

The pertinent part of Ordinance No. 22 reads as follows:

> "This ordinance shall apply to all lands within the Fort Apache Indian Reservation * * * provided, that the rights accruing to members of the Tribe under Article VIII of the Constitution are not hereby jeopardized or abrogated in any way, and provided further that *right of occupancy of reservation lands shall not include exclusive grazing privileges or rights not otherwise provided by this ordinance.*" (Emphasis added).

The foregoing part of Ordinance 22 is a clear attempt to interpret the Constitution and limit its application.

In providing for claims to be presented to the Council, Ordinance 22 provides in part as follows:

> "In giving considerationto such claims the Council shall take into account proof of ownership of the improvements by the claimant, the authority under which the claimant operated in placing such improvements and the unamortized value of the improvements in view of the length of time used together with the use value of the tribal land during the tenure by the claimant."

There is nothing in the Constitution authorizing the passing of an ordinance requiring payment for the use of the tribal land under circumstances such as we have in this case where the Petitioners were permitted to use the land for years and induced to make valuable improvements thereon without at any time being requested for payment. Therefore, that part of the ordinance is also unconstitutional.

In the testimony of Superintendent Donner it appears that when Article VIII of the Constitution was adopted it was for the very purpose of protecting long residence and improved ranges of the Petitioners and others similarly situated. (R. 121). The Department of the Interior placed the same interpretation on Article VIII. (R. 89).

We respectfully submit that the question involved is an important question of Federal law which has not, but should be, settled by this Court and that the Circuit Court of Appeals in its interpretation of the Tribal Constitution has departed from the usual rules governing the interpretation of constitutions and statutes.

As far as we have been able to learn, this is the first case in which the courts have been called upon to interpret the constitution of an Indian Tribe or to determine whether or not a Tribal Council can pass an ordinance in conflict with the Tribal Constitution.

We respectfully submit that the question is a novel one and important enough to be heard and considered by this Court.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX "A"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

EARL WEST, et al,
Appellees.

No. 14,854

Apr. 19, 1956

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Before: STEPHENS and POPE, Circuit Judges, and MATHES, District Judge.

MATHES: District Judge:

This appeal is from a judgment dismissing, after trial on the merits, the Government's suit commenced May 19, 1954, to enjoin an alleged continuing trespass upon lands of the Fort Apache Indian Reservation.

There appears to be no controversy as to the facts. The trial court found inter alia: "That one Corydon C. Cooley, a white man, about the year 1872 married Mollie Pinal, Apache Indian, and that shortly after their marriage they began raising cattle in the vicinity of McNary and Pinetop, Territory of Arizona. That they raised and grazed cattle on what is now a part of the Indian Reservation. That on or about April 5, 1973,

there was born to the said Corydon C. Cooley and Mollie Pinal, a daughter Bell Cooley, who became a registered member of the Apache Tribe; and on or about April 17, 1894, married a white man named Abraham Amos.

"That shortly after the marriage of Bell C. Cooley and Abraham Amos they settled in the vicinity of Big Spring in the Territory of Arizona and in 1906 there was born to the said Abraham Amos and Bell C. Cooley, a daughter, the . . . (appellee) Elsie Amos, now Elsie West.

That . . . (appellee) Earl West (not an Indian) is the husband of . . . Elsie West; that they were married in 1922 and ever since have been husband and wife.

That . . . Earl West and Elsie West have grazed cattle on the Fort Apache Indian Reservation since about 1923 and that the . . . (appellees), other than Lonnie West, who are children of said Earl West and Elsie West, have owned and grazed cattle on the said reservation for several years prior to 1953 . . . "

The District Court further found that in 1926 and again in 1936 the Superintendent of the Reservation "gave permission to the Amos and West family to graze cattle on part of the reservation . . . "; and "that since 1924 the . . . (appellees) have made valuable improvements on the said premises near Big Spring . . . Said improvements consist of dwelling houses, fences, wells (drilled and dug), and water tanks. That Abraham Amos and his wife, the former Bell C. Cooley, made their residence upon the reservation, and that . . . (appellees) have maintained their respective dwelling places on the reservation and on the same premises where they were given permission to graze

cattle in the area of Big Spring. * * * That none of the . . . (appellees) has even applied for membership in an Indian Livestock Association on the Fort Apache Indian Reservation."

The trial court also found: "That the United States of America is the owner of the lands in the State and District of Arizona identified as the Fort Apache Indian Reservation, and said lands were reserved for the use and benefit of the White Mountain Apache Tribe by the Act of Congress dated June 7, 1897.

"That the White Mountain Apache Tribe of the Fort Apache Indian Reservation . . . adopted a Constitution and By-Laws on August 15, 1938, in accordance with Section 16 of the Indian Reorganization Act of June 18, 1934, (48 Stat. 984) and as amended by the Act of June 15, 1935, (49 Stat. 378), and said Constitution and By-Laws were approved by the Assistant Secretary of the Interior on August 26, 1938, and Article VIII thereof provides:

'The general control of the reservation lands and other tribal property shall continue as heretofore, until changed in any particular by ordinance. The reservation land now unallotted shall remain tribal property and shall not be allotted to individuals in severalty, but assignment of land for private use may be made by the Council in conformity with ordinances which may be adopted on this subject, provided the vested rights of members of the tribe are not violated. Right of occupancy of long established allocations or dwelling places and improvements made by individuals or families on tribal lands shall be confirmed by the Council through appropriate ordinances.'

"That the Council of the White Mountain Apache Tribe of August 3, 1953, enacted an ordinance known as Ordinance No. 22, which was approved by the Superintendent of the Fort Apache Agency within ten days after its enactment and was approved by the Assistant Secretary of the Interior on November 3, 1953, and said Ordinance became effective on the date of its approval by the Superintendent on August 7, 1953, and Article III thereof provides:

'This ordinance shall apply to all lands within the Fort Apache Indian Reservation as defined in Article I, of the Constitution . . . , Provided, that the rights accruing to members of the Tribe under Article VIII of the Constitution are not hereby jeopardized or abrogated in any way, and Provided Further That right of occupancy of reservation lands shall not include exclusive grazing privileges or rights not otherwise provided by this Ordinance and nothing in this Ordinance shall affect adversely the rights of individuals to their home sites or dwelling places.

'Consideration shall be given by the Council in actions taken to carry out the provisions of this ordinance to the rights of tribal members to ownership of improvements placed on tribal grazing lands. Any member who is adversely affected by action of the Council pursuant to this ordinance may present a claim to the Counel covering improvements. In giving consideration to such claims the Council shall take into account proof of ownership of the improvements by the claimant, the authority under which the claimant operated in placing such improvements and the unamortized value of the improvements in view of the length of time used together with the use value of the tribal land during tenure by the claimant. Settlement of such claims

shall be negotiated between the Council and the Claimant if possible, with the provision that claims which cannot thus be settled satisfactorily may be referred to the Department of Interior whose judgment shall be binding on both parties or the claimant, if he prefers may submit the claim to a court of proper jurisdiction in which case the Council shall arrange to defend the interests of the Tribe.' "

From the facts found the learned District Judge concluded that: "The defendants have acquired rights of occupancy on the reservation lands of long established allocations and have made improvements on such lands within the meaning and protection of Article VIII of the Tribal Constitution.

"Ordinance No. 22 of the White Mountain Apache Tribe is ineffectual to change or abrogate the rights of defendants on the reservation lands."

The Fort Apache Indian Reservation was created by Act of June 7, 1897. (30 Stat. 62, 64.) The lands comprising the reservation are held in trust by the Government for the occupancy and benefit of the members of the White Mountain Apache Tribe. (Ibid.: *Shoshone Tribe v. United States,* 209 U.S. 476, 497 (1937); cf. *United States v. Creek Nation,* 295 U.S. 103 (1935).)

Thus the White Mountain Apache have "the usual Indian right of occupancy with the fee in the United States." (*United States v. Creek Nation,* supra, 295 U.S. at 109.) And more than a century ago it was said to be "a settled principle, that their right of occupancy is considered as sacred as the fee-simple of the whites." (*Mitchell v. United States,* 34 U.S. (9 Pet.) 711,746 (1935).)

Jurisdiction over the Indians and their tribal lands is "peculiarly within the legislative power of Congress." (*Sioux Indians v. United States,* 277 U.S. 424, 437 (1938).) But Congress has no power to give the use of tribal lands to others, or to appropriate them to public uses, without giving "just compensation" therefor as required by the 5th Amendment. U. S. Const. Amend. V; *United States v. Santa Fe Pac. R. Co.,* 314 U.S. 339, 345 (1931); *Shoshone Tribe v. United States, supra,* 299 U.S. at 497; *United States v. Creek Nation, supra,* 295 U.S. at 110.)

For to deprive the tribe of right of occupancy, without just compensation, "would not be an exercise of guardianship, but an act of confiscation." (*Lane v. Pueblo of Santa Rosa,* 249 U.S. 110, 113 (1919).)

Even if the lands in question were part of the unsettled public domain, no official of the Government would be empowered to grant grazing rights thereon without authority from Congress. (Cf. *Royal Indemnity Co. v. United States,* 313 U.S. 289, 295 (1941).)

Prior to the Taylor Grazing Act (48 Stat. 1269 (1934), 43 U.S.C. Sec. 315 et seq.), there was held to be "an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States . . . shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids this use." (*Buford v. Houtz,* 133 U.S. 320, 326 (1890).)

But it was pointed out in *Omaechevarria v. Idaho,* 246 U.S. 323 (1918) that "Congress has not conferred upon citizens the right to graze stock upon the public lands. The Government has merely suffered the lands

to be so used." (246 U.S. at 352; see *Light v. United States,* 220 U.S. 523 (1911).)

With the Taylor Grazing Act, Congress revoked this indiscriminate "implied license" in favor of an express statutory permit; and as Judge Stephens explained for the Court in *Osborne v. United States,* 145 F. 2d 892 (9th Cir. 1944): " it is safe to say that it has always been the intention and policy of the government to regard the use of its public lands for stock grazing, either under the original tacit consent or . . . under regulation through the permit system, as a privilege whic his withdrawable at any time for any use by the sovereign without the payment of compensation." (145 F. 2d at 896)

It is settled that: "With respect to the public domain, the Constitution vests in Congress the power of disposation and of making all needful rules and regulations. That power is subject to no limitations." (*Gibson v. Chouteau,* 80 U.S. (13 Wall.) 90, 99 (1871); *cf. Utah Power & Light Co. v. United States,* 243 U.S. 389, 405 (1917); *Oman v. United States,* 195 F. 2d 710 (10th Cir. 1952); *Garcia v. Sumrall,* 58 Ariz. 526, 121 P. 2d 640 (1942).)

It is also beyond question that "the Government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers." (*Camfield v. United States,* 167 U. S. 518, 524 (1897).)

The fact that the lands involved here are held by the Government in trust for the Indians affords no basis for distinguishing appellees' claims to vested and exclusive grazing rights from those of any citizen who

has for years gratuitously grazed his cattle on the public domain. For with respect to the public domain not reserved for the Indians, it has been declared that: "All the public lands of the nation are held in trust for the people of the whole country." (*Light v. United States, supra,* 220 U.S. at 537.)

The permission gratuitously granted by the Superintendent of the Reservation did not even purport to grant appellees any non-revocable right; and moreover could not in any event have greater legal force than a mere license at the sufferance of the Government, terminable at any time. (*Omachevarria v. Idaho, supra,* 246 U.S. at 352, *Light v. United States, supra,* 220 U.S. at 535.)

Nor can any equitable estoppel be invoked against the Government under the facts at bar. The Superintendent of the Reservation "was obviously without authority to dispose of the rights of the United States . . . and could not estop it from asserting rights which he could not surrender." (*Utah v. United States,* 284 U.S. 534, 545-546 (1932); *Cramer v. United States,* 261 U.S. 219, 234 (1923).)

Since not even Congress could lawfully dispose of the rights of the Indian tribe to possession, occupancy and use of the lands in question without payment of just compensation (*United States v. Santa Fe Pac. R. Co., supra,* 314 U.S. at 345), "it is enough to say that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." (*Utah Power & Light Co. v. United States, supra,* 243 U.S. at 409 (1917).)

It follows that so long as the lands of the Fort Apache Indian Reservation are held by the United States in trust for the White Mountain Apache Tribe, Congress has "the power to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them . . . " (*Utah Power & Light Co. v. United States, supra,* 243 U.S. at 405, *cf.* 25 U.S.C. Sec. 461.)

It was stipulated at the bar upon oral argument that the Fort Apache Reservation contains approximately 2,000,000 acres of grazing land, and that the White Mountain Apache Tribe includes some 1200 families. So if the grazing rights were equally divided, there would be some 1600 acres of grazing available for each family, as contrasted with some 30,000 acres which appellees, a single family, here claim to have acquired as a "long established allocation" by free use and the Superintendent's gift.

Admittedly the Government is vested with legal title. It must be conceded as well that any license appellees may have had to occupy the lands at the sufferance of the Government has been terminated. Hence, as between the Government and appellees, the latter are now clearly trespassers. (1 Restatement, Torts, Sec. 158(b), 171, 174, 176; *Lee v. Johnson,* 70 Ariz. 122, 216 P. 2d 711 (1950).)

Accordingly the Government is entitled to an injunction restraining further trespass, thus vindicating the right to possession and occupancy held in trust for the Tribe.

What has been said applies only to appellees' rights in this suit as between them and the Government.

Rights of occupancy, as well as claims covering improvements, which appellees who are members of the Tribe may in common fairness and good conscience assert as against other members of the Tribe under Article VIII of the Tribal Constitution, and Ordinance No. 22 adopted pursuant thereto (25 U.S.C. Sec. 476), is a matter for determination by the Council of the Tribe, who are admonished in Article VIII that: "Right of occupancy of long established allocations or dwelling places and improvements made by individuals or families on tribal lands shall be confirmed by the Council through appropriate ordinances."

If appellees who are tribal members seek the relief to which they may be entitled under the Tribal Constitution and ordinances, this Court cannot assume that the Tribal Council "would fail in the performance of any duty imposed . . . by the Constitution", and deny them justice. (*Yakus v. United States*, 321 U.S. 414, 434 (1944).)

The judgment of dismissal is reversed and the cause remanded for further proceedings consistent with this opinion.

(Endorsed:) Opinion. Filed Apr. 19, 1956. Paul P. O'Brien, Clerk.

APPENDIX "B"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

EARL WEST, et al,
Appellees.

No. 14,854

LAWS AND STATUTES INVOLVED

The following are the pertinent parts of the Tribal Constitution and Ordinance No. 22:

Article VIII of the Constitution of the White Mountain Apache Tribe of the Fort Apache Indian Reservation

ARTICLE VIII - LANDS

The general control of the reservation lands and other tribal property shall continue as heretofore, until changed in any particular by ordinance. The reservation land now unallotted shall remain tribal property and shall not be allotted to individuals in severalty, but assignment of land for private use may be made by the Council in conformity with ordinances which may be adopted on this subject, provided the vested rights of members of the tribe are not violated. Right of occupancy of long established allocations or dwelling places and improvements made by individuals or families on tribal lands shall be confirmed by the Council through appropriate ordinances.

Article III of Ordinance No. 22 of the White Mountain Apache Tribe of the Fort Apache Indian Reservation

ARTICLE III - LANDS

This ordinance shall apply to all lands within the

Fort Apache Indian Reservation as defined in Article I, of the Constitution of the White Mountain Apache Tribe of the Fort Apache Indian Reservation, approved August 26, 1938, provided, that the rights accruing to members of the Tribe under Article VIII of the Constitution are not hereby jeopardized or abrogated in any way, and provided further that right of occupancy of reservation lands shall not include exclusive grazing privileges or rights not otherwise provided by this ordinance and nothing in this ordinance shall affect adversely the rights of individuals to their home sites or dwelling places.

Consideration shall be given by the Council in actions taken to carry out the provisions of this ordinance to the rights of tribal members to ownership of improvements placed on tribal grazing lands. Any member who is adversely affected by action of the Council pursuant to this ordinance may present a claim to the Council covering improvements. In giving consideration to such claims the Council shall take into account proof of ownership of the improvements by the claimant, the authority under which the claimant operated in placing such improvements and the unamortized value of the improvements in view of the length of time used together with the use value of the tribal land during the tenure by the claimant. Settlement of such claims shall be negotiated between the Council and the claimant if possible, with the provision that claims which cannot thus be settled satisfactorily may be referred to the Department of Interior whose judgment shall be binding on both parties, or the claimant, if he prefers may submit the claim to a court of proper jurisdiction in which case the Council shall arrange to defend the interests of the tribe.

APPENDIX "C"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

EARL WEST, et al,
Appellees.

No. 14,854

JUDGMENT

Appeal from the United States District Court for the District of Arizona.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and hereby is remanded to the said District Court for further proceedings consistent with the opinion of this Court.

(ENDORSED:) Judgment. Filed and Entered: April 19, 1956. Paul P. O'Brien, Clerk.

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 193

EARL WEST, et al., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A, pp. A-1–A-10) is reported at 232 F. 2d 694 (C. A. 9). The memorandum opinion of the District Court is printed at R. 26.

JURISDICTION

The judgment of the Court of Appeals was entered April 19, 1956 (Pet. App. C). A timely petition for rehearing was denied on May 25, 1956 (Pet. App. D). The petition for a writ of certiorari was filed on June 23, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

INDIAN TRIBAL LAWS INVOLVED

Article VIII of the Constitution of the White Mountain Apache Tribe, and Article III of Ordinance No. 22 enacted by the Tribal Council in accordance with the Tribal Constitution, are printed at pages A-11, A-12 of the Petitioners' Appendix A.

QUESTIONS PRESENTED

1. Whether a white man who has grazed cattle on the White Mountain Apache Indian Reservation with gratuitous permission of the Superintendent has acquired rights under the Tribal Constitution which the Tribal Council cannot abrogate.

2. Whether members of the Tribe who have grazed cattle on the White Mountain Apache Indian Reservation with gratuitous permission of the Superintendent have acquired vested rights under the Constitution, so that the Tribal Council's ordinance requiring membership in grazing associations as a prerequisite to grazing on tribal property does not apply to them.

STATEMENT

The United States, on behalf of the White Mountain Apache Indian Tribe, instituted this action to enjoin petitioners from grazing livestock on the White Mountain Apache Indian Reservation, Arizona. Title to the land is in the United States, held in trust for the Indians. The material facts are as follows:

Petitioner Earl West is a white man. The other petitioners, his wife and children, are Indians and members of the White Mountain Apache Tribe or eligible for enrollment (R. 30). With the permission of successive superintendents of the Reservation, petitioners have grazed livestock on some 30,000 acres of

tribal land within the Reservation since about 1923.[1] Improvements have been placed upon the lands by the West family.

In 1938, the Tribe, by authority of Section 16 of the Wheeler-Howard Act, 48 Stat. 984, 25 U. S. C. 476, adopted a Constitution and by-laws (R. 41-55). Article VIII of the Constitution, relating to Tribal lands, protects "right of occupancy of long established allocations." In 1953, the Tribal Council, in order to increase the productivity of the range, enacted, and the Secretary of the Interior approved, Ordinance No. 22.[2] The Ordinance establishes grazing districts in the Reservation. In each of these districts grazing associations are to be formed by members of the Tribe in the districts, and grazing permits will be issued only to members of the associations. Article III of the Ordinance provides that "right of occupancy of reservation lands shall not include exclusive grazing privileges."

Petitioner Earl West is ineligible to join a grazing association. The other petitioners, his wife and children (other than two who are minors), are eligible to join but have refused. Petitioners based their refusal to comply with the Ordinance on the contention that, since successive superintendents had allowed them to graze on Tribal property, they have established a "right of occupancy of long established allocation" protected by the Tribal Constitution. Because the petitioners have refused to comply with the Ordinance this suit was filed.

---

[1] There are some 2,000,000 acres of grazing land on the Reservation and 1,200 families, making an average of 1,600 acres per family.

[2] The Ordinance incorporates as its objective the objectives set out in 25 C.F.R. 71, the Grazing Regulations of the Department of the Interior, regarding Indian lands under the jurisdiction of the Bureau of Indian Affairs.

Following a trial, the District Court refused to grant the injunction and held that the petitioners had acquired a "right of occupancy" which was protected by the Tribal Constitution and which the Ordinance could not abrogate (R. 26). The United States appealed. The Court of Appeals reversed, holding that the permission to graze in this area has been revoked and also that the petitioners who are members of the Tribe were protected regarding their improvements by the Ordinance.

ARGUMENT

1. Petitioner Earl West, being a white man, has no rights at all in the Tribal property and agents of the United States could not give him any. Moreover, the record is clear that the superintendents who permitted West to graze on this land did not intend to give him irrevocable rights (R. 125). As for the petitioners who are members of the Tribe but have refused to join a grazing association, their claim to special consideration, based upon the asserted vested right to graze on 30,000 acres of Tribal property, likewise lacks merit. The provision of the Tribal Constitution relied on protects only home sites, small farms and gardens, and certainly not vast areas of grazing lands. The area claimed by petitioners is approximately 19 times the amount available per family if the grazing area were equally divided among the families on the Reservation (see fn. 1, *supra*, p. 3). The Tribal Constitution surely did not intend to grant such a preference.

2. The petition also challenges the right of the Tribe to pass this Ordinance, alleging that it is contrary to the Tribal Constitution. But Article VIII gives the Tribal Council power to legislate relative to the Tribal property. The regulation of grazing in this arid section

of the country is the rule rather than the exception, and it is certainly in the best interests of the Tribe that some orderly system regarding grazing be adopted. It cannot be doubted, therefore, that this was one of the types of legislation contemplated by the Constitution.

The Ordinance gratuitously provides that the Tribal Council will negotiate with members of the Tribe for payment for improvements which may have been placed on Tribal property. The petitioners protest, since the Council will offset a "use value" of the property in determining the amounts to be paid for the improvements, that this part of the Ordinance is unconstitutional. This argument is premature since petitioners have never presented such a claim for improvements under the Ordinance, but have always contended that it was inapplicable to them.

3. This case involves an effort on the part of a Tribal Council to raise the economic level of its Tribe, an effort which has been resisted by a single white man and his Indian family. The problem is an isolated one, and it has been resolved by the Court of Appeals with jurisdiction over the area occupied by the Tribe. No general issue of law is involved, nor has any injustice been perpetrated.

APPENDIX "D"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Friday, May 25, 1956.

Before: STEPHENS and POPE, Circuit Judges, and
MATHES, District Judge.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellees filed May 17, 1956, and within time allowed therefor by rule of Court for a rehearing of the above cause be, and hereby is denied.

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CONCLUSION

The decision of the Court of Appeals is clearly correct, and no question of general importance is presented. It is submitted that further review is not warranted and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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